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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

YETI COOLERS, LLC) Docket No. A 17-CA-1145 RP
)
vs.) Austin, Texas
)
WAL-MART STORES, INC.) April 24, 2018

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE ANDREW W. AUSTIN

APPEARANCES:

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Proceedings reported by electrical digital sound recording,
transcript produced by computer.

1 (Proceedings commence at 2:38 p.m.)

2 THE CLERK: The Court is now in session for a status
3 conference:

4 17-CV-1145, Yeti Coolers, LLC vs. Wal-Mart Stores, Inc.

5 THE COURT: Counsel, if you want to introduce yourself
6 for the record.

7 MR. BERGHAMMER: Sure, your Honor.

8 Joe Berghammer on behalf of Yeti.

9 MR. COOPERMAN: Good afternoon, your Honor.
10 Mark Cooperman for Yeti.

11 MR. BARKSDALE: Good afternoon, your Honor.
12 Bryan Barksdale, general counsel for Yeti.

13 MR. HAYES: Your Honor, Butch Hayes for Wal-Mart, and
14 I'd like to introduce you to my colleague, Tara Elliot, who can
15 introduce herself.

16 MS. ELLIOTT: Good afternoon, your Honor.

17 Tara Elliot on behalf of Wal-Mart.

18 THE COURT: Thank you.

19 And just reminder, since we get our record from an
20 audio recording, if you can, make sure that your voice is getting
21 picked up by the microphone or else you're inaudible or on the --
22 any transcript.

23 All right. So we're here on the motion for protective
24 order to stay discovery that Wal-Mart's filed. I read
25 everything. I actually read all the motions to dismiss and the

1 attachments, so I would like to cut to the chase here today. And
2 as I understand it, the reason why Wal-Mart is seeking to stay
3 discovery at this point relates to the fact that there's a
4 settlement agreement in the case from the prior litigation that
5 Wal-Mart believes effectively dooms the claims that Yeti's trying
6 to make. Yeti disagrees with that. And there's a lot going back
7 and forth about what exactly this case is alleging, so I want to
8 try to get clarity on that, as well.

9 Before we get into anything further, though, this
10 settlement agreement was confidential. There's been a lot of
11 sealed stuff filed. We hate that, but we're also busy over here
12 right now that we're not doing what we normally do, which would
13 be to kick orders back at you when you ask to file stuff under
14 seal that says, cut it out. And that takes more work than just
15 letting you file it, so we've just been letting you file it.

16 But the relevant clause at issue here in the settlement
17 agreement, C.3, I think it is, or C.2, whatever that subparagraph
18 is, is there any objection to the Court discussing that clause
19 here in court today openly?

20 MR. BERGHAMMER: Your Honor, from Yeti's side, no
21 objection, but I think we need to discuss all of Section C. So
22 C.1, 2, 3 and 4.

23 MS. ELLIOTT: Your Honor, Wal-Mart does not object to
24 the discussion of C -- provisions of C on the record.

25 THE COURT: Okay. All right.

1 So as I understand it, then, let me focus what I think
2 is the point of contest here is that Wal-Mart appears to be
3 taking the position that that paragraph in C.2 excludes from many
4 of the obligations that it has to keep counterfeit or other
5 offend -- infringing goods off of the web page. It exempts from
6 that, using the language that's there, commercial activity on
7 e-commerce platforms Wal-Mart does not control, including, but
8 not limited to, the Wal-Mart marketplace.

9 Now, Wal-Mart's position that everything they're being
10 accused of in the current lawsuit occurred there and falls within
11 the scope of that. Yeti hasn't taken a specific position on
12 that, except to say, it seems I'm not having -- you know, I don't
13 find anywhere where you discuss that language and why that
14 language doesn't apply, Mr. Berghammer. What I've seen is
15 statements that, well, we think Wal-Mart controls it, its website
16 and, therefore, that this doesn't apply. So.

17 MR. BERGHAMMER: Sure.

18 THE COURT: And I'm sure there's some elaboration on
19 that, as well.

20 But before you get into any argument, is that an
21 accurate statement of what -- well, let me ask this question, Mr.
22 Berghammer, of you. If, in fact, the clause that Wal-Mart's
23 relying on is found to apply to anything sold on the Wal-Mart web
24 page that's not sold by them, but by a third party, are there any
25 claims in this lawsuit left?

1 MR. BERGHAMMER: Absolutely.

2 THE COURT: Okay.

3 MR. BERGHAMMER: And --

4 THE COURT: Well, let's address that, then, if you
5 would.

6 MR. BERGHAMMER: Sure. Where do you want me, your
7 Honor?

8 THE COURT: Wherever you'd like.

9 MR. BERGHAMMER: I think I'm going to go over there
10 because I can -- I don't have to crouch.

11 THE COURT: Okay.

12 MR. BERGHAMMER: So -- and we disagree with Wal-Mart's
13 interpretation. But even if Wal-Mart's interpretation of --

14 THE COURT: And I don't think I'm here to decide that
15 obviously. That's the motion to dismiss. That's been Judge
16 Pitman, not me.

17 MR. BERGHAMMER: Yep.

18 THE COURT: But I'm just trying to frame the issue and
19 get straight to where we're fighting so that --

20 MR. BERGHAMMER: Uh-huh.

21 THE COURT: -- I know how to answer this particular
22 motion. So.

23 MR. BERGHAMMER: And, your Honor, I'm not sure that
24 issue is before Judge Pitman, that Wal-Mart's motion to dismiss
25 was actually based on res judicata, and was based on no damage,

1 and was based on Yeti not having enough allegations in its
2 complaint. So I actually don't know that's in front of Judge
3 Pitman, but I also want to go to the crux of your issue.

4 If Wal-Mart's interpretation is correct, then it's
5 possible that Yeti's claims for breach of contract could be out
6 of the case. All of Yeti's claims for infringements of its IP
7 remain. That that provision -- this is why we put the Elmo on.
8 So that provision, your Honor, is C.3.

9 THE COURT: Right.

10 MR. BERGHAMMER: And it states -- I gotta get there.
11 Oh, no. It's C.2.

12 THE COURT: Yep.

13 MR. BERGHAMMER: So in C.2, it states that -- I'm
14 sorry, your Honor. When it states, is not within the control of
15 Wal-Mart and any of the above-prohibited activities involving the
16 accused products on or through such platforms do not constitute a
17 violation of this provision by Wal-Mart.

18 THE COURT: All right.

19 But it does say that -- gives one specific item that is
20 within the scope of the clause, and that is commercial activity
21 on e-commerce platforms Wal-Mart does not control, including the
22 Wal-Mart marketplace. And I take it that what Wal-Mart seems to
23 be saying is that everything that's at issue in the lawsuit here,
24 all of these products were products that are on the Wal-Mart
25 marketplace that aren't Wal-Mart sales but some third party.

1 MR. BERGHAMMER: So, your Honor, we very much disagree
2 with Wal-Mart there, and that's why you have to look at Section
3 C.4.

4 THE COURT: Okay.

5 MR. BERGHAMMER: And I will just let you read that,
6 your Honor.

7 THE COURT: Yeah. I'm familiar with it.

8 MR. BERGHAMMER: Okay. So there's two websites at
9 issue here. One of them is C.2, which is
10 marketplace.walmart.com, and the other is walmart.com. Yeti
11 hasn't accused Wal-Mart of doing anything wrong on
12 marketplace.walmart.com. Yeti has never done anything that would
13 affect C.2. It's our understanding that marketplace.walmart.com
14 is Wal-Mart's internal web dealings with its suppliers.

15 So if a supplier wants to sell products through
16 Wal-Mart that it interacts with Wal-Mart through
17 marketplace.walmart.com, then -- and that's all internal and
18 we're not -- and I could see how there could be infringements
19 within the internal marketplace what someone could be confused,
20 Wal-Mart could be confused, hey, you, Mr. Seller, is this a Yeti
21 product, is this not a Yeti product, that would be a type of
22 infringement.

23 What we were concerned about is www.walmart.com.
24 That's their external website. That's the website that faces the
25 public.

1 THE COURT: But, I mean -- I mean, I see your argument,
2 I mean, but when you read C.2, it's talking about e-commerce
3 platforms like -- that it doesn't control, and it lists the
4 Wal-Mart marketplace as one of those. So either Wal-Mart was
5 massively mistaken about what it does or doesn't control or they
6 were intending to say that -- I mean, let me go back a step.

7 My understanding from what's been filed is Wal-Mart's
8 web page, much like Amazon's web page, includes things that it
9 sells directly and fulfills, and that it also has third-party
10 sellers that it allows to use the marketplace, and those are
11 fulfilled by third-party users. eBay is one of those. That's
12 listed in the example, as well, in the C.2, but it listed
13 Wal-Mart's marketplace as something it didn't control.

14 So I'm kind of baffled how you can read that to mean
15 that only if they were selling something to the public on a
16 website called marketplace.walmart.com would C.2 carve that out.

17 MR. BERGHAMMER: So.

18 THE COURT: But I mean --

19 MR. BERGHAMMER: Right. I'm trying to think of how
20 best to phrase this, your Honor. I lost my train of thought. It
21 will come.

22 Wal-Mart has complete control of www.walmart.com.
23 Hundred percent control. All the documents reflect that. All of
24 Wal-Mart's statements reflect that. And walmart.com is different
25 than Alibaba or others. It's an invitation-only website. You

1 have to get invited to go to walmart.com. And Wal-Mart agrees
2 that it can take down anything that's on walmart.com. It has
3 complete control and Wal-Mart makes 15 percent of the sales of
4 products on walmart.com.

5 And Wal-Mart goes on to say that it controls
6 www.walmart.com. So while this agreement says Wal-Mart doesn't
7 control marketplace.walmart.com, it says that Wal-Mart does
8 control www.walmart.com, which is what we're accusing of
9 infringement.

10 So, your Honor, there may be something in the aiding
11 and abetting language that C.2 talks specifically about aiding
12 and abetting, and it may be that an infringement that is limited
13 to only marketplace.walmart.com, but never gets to walmart.com,
14 that if Wal-Mart's reading's correct, Yeti couldn't sue Wal-Mart
15 for aiding and abetting based on that activity at
16 marketplace.walmart.com.

17 But, again, I want to go back, your Honor. They're two
18 very different things: One's internal, one's external. Yeti's
19 not suing on the internal site. Yeti's only suing on the
20 external site. And beyond all that, your Honor, this is not a
21 covenant not to sue. Yeti is not saying in C.2, Yeti covenants
22 not to sue Wal-Mart. Yeti is not saying in C.2, Wal-Mart can
23 sell counterfeit products on www.walmart.com. That's --
24 Wal-Mart's interpretation is through this agreement, Yeti said,
25 Wal-Mart, sell as many counterfeit as you want on your website.

1 THE COURT: I think it's a little less than that. I
2 think what they're saying is, they didn't want to get sued for
3 that, and that if you wanted to sue third-party sellers on --
4 that were selling counterfeit product on their website, that you
5 needed to go after those sellers directly. I think that's what
6 Wal-Mart's position is.

7 MR. BERGHAMMER: So, your Honor, even -- so okay. We
8 disagree that the agreement is so limiting; but even if it is,
9 all that the agreement states is that whatever happens up here
10 with marketplace.walmart.com does not constitute a violation of
11 this provision by Wal-Mart. And so, that's C.2. It does not
12 constitute a violation of this provision, C.2 by Wal-Mart. Has
13 nothing to do with C.4, has nothing to do with C.1, and, on top
14 of that, has nothing to do with Yeti's overall intellectual
15 property rights.

16 THE COURT: Can you pull that down a little bit so I
17 can read C.1? Thank you.

18 MR. BERGHAMMER: Sorry, your Honor.

19 THE COURT: Okay.

20 MR. BERGHAMMER: So Wal-Mart -- we think Wal-Mart has
21 breached the agreement. We think it breached C.1 and C.4. We
22 don't think it breached C.2. Obviously open to -- you know, we
23 still have to do analysis, et cetera. But if Wal-Mart's correct
24 that C.2 doesn't apply, Yeti still has its rights under C.1 and
25 C.4.

1 THE COURT: To make sure I understand and make it as
2 explicit, so what you've just said is that C.2, where this
3 language that we've been talking about exists, prohibits Wal-Mart
4 from -- or their -- it's an agreement by Wal-Mart not to aid,
5 abet, assist other persons or companies in manufacturing, using,
6 marketing, advertising, promoting, offering to sell, selling,
7 importing, et cetera, any of the accused product, and you're not
8 saying they breached that provision.

9 What you're saying in this new lawsuit is that Wal-Mart
10 breached the agreement that it will not market, offer to sell,
11 sell, use, import, purchase any of the accused products.

12 MR. BERGHAMMER: So --

13 THE COURT: And also, that C.4 that they didn't do the
14 deletions that they were supposed to do. And that even if 2 is
15 applied to publicly available sales, that you're not worried
16 about that because that's limited to -- the exclusion to
17 eliminate all doubts is limited to C -- to the agreements of C.2.

18 MR. BERGHAMMER: So, your Honor, I don't want to, a
19 hundred percent, say that we don't have an action under C.2.

20 THE COURT: Well, I don't know. It's time to take a
21 position sometimes and I'm asking for a position.

22 MR. BERGHAMMER: Okay. We have -- so I would say we
23 have an action -- give me just a second, your Honor. We
24 definitely have an action under C.4 and under C.1. I just want
25 to make sure I've got my thoughts correct in my head, your Honor.

1 And what I'd say, your Honor, is regarding Wal-Mart's activity on
2 marketplace.walmart.com, to the extent Wal-Mart does not have
3 control, we do not have an action under C.2.

4 THE COURT: Okay.

5 MR. BERGHAMMER: But, again, your Honor, I want to pull
6 back for the purpose of this motion to stay. All of Yeti's IP
7 rights come into play. Again, this isn't a --

8 THE COURT: Well, all right. Let's move on from
9 this --

10 MR. BERGHAMMER: Okay. Thank you, your Honor.

11 THE COURT: -- issue and I'll give -- obviously
12 Wal-Mart's going to have something to say about that.

13 MR. BERGHAMMER: Sure. Thank you, your Honor.

14 THE COURT: But the other big issue here that seems to
15 be a little bit of ships passing in the night is, can you state
16 emphatically, clearly that the only thing that you're suing for
17 -- that Yeti is suing for in this case are actions that took
18 place -- I think the phrase that y'all had used is after the
19 selloff period.

20 MR. BERGHAMMER: Uh-huh.

21 THE COURT: And you're not suing for any behavior that
22 occurred before the selloff.

23 MR. BERGHAMMER: Yes, with a coda. So a hundred
24 percent yes, what we are suing on is activity after the selloff
25 period. One of the remedies we are seeking is our damages based

1 on that, and that may include rescission of the agreement. That
2 may include restitution damages from the agreement, which may
3 include the profits from the previous sales.

4 THE COURT: But leaving aside those issues.

5 MR. BERGHAMMER: Uh-huh.

6 THE COURT: The actionable facts, the infringing
7 activities that you're suing for are those that occurred after
8 the selloff.

9 MR. BERGHAMMER: Selloff period.

10 THE COURT: Selloff period.

11 MR. BERGHAMMER: A hundred percent, yes.

12 THE COURT: And you're not seeking to hold Wal-Mart
13 liable for actions it may have taken before that time.

14 MR. BERGHAMMER: Correct.

15 THE COURT: All right.

16 MR. BERGHAMMER: Okay.

17 THE COURT: Thank you.

18 MR. BERGHAMMER: Thank you, your Honor.

19 THE COURT: Anything else you want to add, I guess, at
20 this time on that point? It's not your motion. I'm going to let
21 Ms. Elliot start where she wanted to probably. But anything else
22 on those issues?

23 MR. BERGHAMMER: Just thinking if there's anything --

24 THE COURT: I'll give you an opportunity to obviously
25 respond on the motion.

1 MR. BERGHAMMER: Not for now, your Honor. When I look
2 at my notes, I may have others.

3 THE COURT: All right.

4 MR. BERGHAMMER: Thank you, your Honor.

5 THE COURT: Ms. Elliot.

6 MS. ELLIOTT: Thank you, your Honor.

7 Your Honor has obviously gone straight to the heart of
8 matters. We appreciate the Court's willingness to hear oral
9 argument on this motion. And we also appreciate that the Court
10 has read the papers, both on the motion for the protective order
11 as well as the motion to dismiss.

12 Wal-Mart's obviously seeking a protective order for all
13 discovery in this case pending the resolution of that motion to
14 dismiss, and we understand it's pending before Judge Pitman. And
15 I think it's important for us to note that Wal-Mart does not do
16 this lightly. Wal-Mart does so knowing full well this court's
17 precedent, knowing full well that it's --

18 THE COURT: Can I -- I'll put you at ease. I get it.

19 MS. ELLIOTT: Okay.

20 THE COURT: This is a slightly different situation.
21 When there's been a prior suit and then, there's a new suit.

22 MS. ELLIOTT: Yes.

23 THE COURT: It's not the same circumstances. So -- and
24 whether it's sufficient enough to get past that, I don't know,
25 but you don't need to apologize, I guess.

1 MS. ELLIOTT: Oh, I appreciate that, your Honor.

2 At the end of the day, we're here having resolved the
3 parties' disputes between Yeti and Wal-Mart over a year ago. And
4 Wal-Mart, instead of battling over designs that we respectfully
5 submit aren't innovative and aren't inventive, Wal-Mart chose an
6 amicable resolution to alter that design in a way that Yeti
7 didn't object to and didn't find problematic, and that
8 understanding was memorialized in the agreement that we are all
9 focused on.

10 In that settlement, the parties also unequivocally
11 agreed to some terms that are at the heart of the matter, and we
12 discussed some of them. But I think just to orient us to what
13 those important terms were, your Honor, if I may just enumerate
14 what we think are pivotal provisions.

15 First, Yeti agreed not to sue Wal-Mart on issues it
16 raised or could have raised in that suit. A lot of what my
17 colleague, Mr. Berghammer, just talked about are precisely within
18 the scope of the lawsuit it filed in 2016, and that was resolved
19 by settlement and that was dismissed with prejudice in June of
20 2017.

21 THE COURT: Well, he does say, though, and I -- he
22 said, unequivocally, that facts that would be the liability facts
23 all postdate the selloff period. So doesn't that make them if
24 they're viable.

25 MS. ELLIOTT: Uh-huh.

1 THE COURT: If they survive a dismissal motion,
2 wouldn't those be new claims?

3 MS. ELLIOTT: So it's interesting that's one of several
4 things we heard today that is not in Yeti's complaint. Because
5 that position is nowhere found in the complaint, and it is quite
6 equivocal in their papers, both in their opposition and to the
7 motion to dismiss their opposition to the pending motion, and in
8 their discovery responses. And despite Wal-Mart's best efforts
9 to pin Yeti down, in our own course of trying to resolve this,
10 they refuse to make the concession they just made a few moments
11 ago. We're glad to hear it, but we're still left with the
12 complaint and two rounds of discovery, 95 document requests and
13 16 interrogatories that in no way honor the concession that was
14 just made and more so, is aligned with the breadth of the
15 complaint.

16 That's why we're here and seeking the Court's help
17 because the positions that are being taken now are not the
18 positions that we're forced to reckon with as a defendant in this
19 action, and we think that is abusive, and that's precisely the
20 kind of matter that warrants a stay and a protective order.

21 The second provision that we think is important to
22 focus on in that agreement is that Wal-Mart could sell its
23 existing inventory until October 17th. It sounds like there's no
24 dispute over that, but it's an important point that I suspect
25 we'll come back to. But most importantly is that provision we've

1 been all been focused on. It's this e-commerce provision that
2 we've probably all looked at numerous times at this point, but
3 it's worth giving some focus now. Because it uses -- it's
4 prefaced by those five words that we as lawyers all know, it
5 invoked when the parties purposely want to highlight this is
6 important and we want to preempt the misinterpretation, we want
7 to literally avoid any doubt. Those words were chosen. Yeti is
8 well represented by experienced counsel. We went over this and
9 went back and forth over this agreement for months, and Yeti's
10 CEO signed it. These were terms they unequivocally agreed to.

11 We are finding ourselves contending with positions in
12 their opposition briefs, positions stated just now about whether
13 or not Wal-Mart controls when, in fact, it's been wholly resolved
14 by both sides. It's not just Wal-Mart's position, it's now
15 Wal-Mart's and Yeti's position because both parties signed off on
16 there for the avoidance of doubt.

17 Good cause to stay discovery here, we think, is well
18 established, your Honor. It's established because -- not because
19 Wal-Mart has a subjective, good-faith belief in its
20 meritorious -- this motion to dismiss. We do have that. But
21 that's not the reason why I think good cause is shown here. I
22 think it's shown and established through Yeti's admissions and
23 Yeti's omissions.

24 And your Honor started the hearing today pointing out
25 one of the biggest omissions, which is Yeti never addressed this

1 language in any of their papers. Not once did they address this
2 language, and it's the obvious elephant in the room and perhaps
3 probably obvious why.

4 But that's not the only thing Yeti doesn't address.
5 Yeti doesn't address the Federal Circuit case law, the Ninth
6 Circuit case law, the Middle District of Pennsylvania and Alabama
7 who followed those provisions, and those cases universally say,
8 consistent with this language in the agreement, that third-party
9 sellers -- or let me rephrase that. E-commerce platform
10 companies aren't responsible for the activities, the torts, if
11 you will, of third-party sellers.

12 And Amazon has frequently battled this issue and has
13 prevailed all the way up to the Ninth Circuit and the Federal
14 Circuit. One was in the context of what technically is a sale.
15 It analyzed the UCC language. Another case analyzed intellectual
16 property claims. This is not brand-new and it's not surprising
17 that the language of our agreement that both sides agreed to for
18 the avoidance of doubt follows that case law on that precedent.
19 Yeti omits that and doesn't address that, as well.

20 Yeti also, to a point your Honor, I think, observed
21 already, never identifies any products that Wal-Mart is selling
22 or manufacturing that would give rise to a plausible claim for
23 relief. Every last example we've seen that's in the complaint
24 and then, all examples that have come after the complaint which
25 aren't appropriate on the motion to dismiss, in any event, have

1 been sales by third parties. So parties who are selling the
2 product on walmart.com.

3 I'll say one more thing, and then, i want to get to a
4 couple of the issues that I heard Mr. Berghammer mention and, I
5 think, warrants some rebuttal. Yeti never identifies any harm
6 associated with not receiving the notice information in November.
7 Why do we think that's important? Because when he -- I think
8 when the Court does get an opportunity to go through the merits
9 of the motion to dismiss, I think the Court will find that that's
10 what's left.

11 If there is any discernible claim -- and I'm not
12 acknowledging that it's a well-pled claim. But if there's any
13 claim that you can carve out once you put past what is foreclosed
14 by the previous settlement and lawsuit, what's foreclosed by this
15 agreement C.2 and the case law that says third parties selling on
16 e-commerce platforms are not the responsibility of the e-commerce
17 platform provider, then all you have left is a breach of contract
18 because in Yeti's allegation, Wal-Mart failed to provide
19 information in a timely manner.

20 Wal-Mart does not concede that, but there are issues
21 that one could conceivably argue around that. That claim still
22 fails because there's absolutely no damages that they've
23 articulated. And Texas state case law and federal case law is
24 observed, that's a requirement. It's a required element of a
25 breach claim that there actually be some damages. No -- no

1 recitation whatsoever.

2 And it can't be the same alleged damages as IP
3 infringement claims because if we're right -- and I'm not saying
4 that we'll win on that, but if we're right, those go away.
5 They've been foreclosed in the previous case.

6 So those are the omissions that I think are pretty
7 stark: No addressing C.2 in the papers before today, no
8 addressing any Wal-Mart products sold. We've stopped selling
9 Ozark Trail products, which was at issue in the previous case.
10 Doesn't address the federal case law about third-party platforms
11 and doesn't identify any harm. But it's not just the omissions.
12 It's actually what they admitted that we think provides the good
13 cause here for a protective order.

14 Yeti has admitted both in its papers and to Judge
15 Pitman now in a scheduling conference that this is now a
16 counterfeit case. So we've gone from the 142-paragraph complaint
17 in this case, 16 claims, and they're positioning this case as a
18 counterfeit case. Your Honor, we respectfully submit you can't
19 see that case looking at the complaint, but we'll take that as it
20 is that they've now shifted.

21 Yeti also admits in its second set of discovery is
22 directed to the post-October 2017 activity, which your Honor was
23 able to get a position on Yeti that that's now what they're
24 focused on. Again, divorce from the complaint, divorce from what
25 Wal-Mart would have otherwise been obligated to do by way of work

1 with witnesses and documents in response to 95 document requests
2 and 16 interrogatories but for us getting to the point where we
3 now know they're only accusing post-October 2017.

4 But what else does Yeti admit? In its opposition to
5 the motion for protective order, on page 8, it admits that it's
6 seeking discovery to help identify claims. Claims that it might
7 be possible. The problem with that, your Honor, is the Supreme
8 Court has said on numerous occasions, you can't do that. Iqbal
9 and Twombly say pretty clearly that you actually have to state a
10 plausible pleading in the complaint. You can't use the device of
11 discovery to actually identify a claim.

12 And that's prejudicial and burdensome and oppressive to
13 the defendant, who has to answer a sprawling 16-count complaint
14 and the breadth of discovery Wal-Mart has received when, in fact,
15 they have effectively admitted in their papers they need the
16 discovery to come up with the claims.

17 Last point I'll make before I turn to some of the
18 points that we heard for the first time today is that Yeti does
19 admit -- and this is on page 7 of their opposition to the motion
20 to dismiss -- that it filed this case in part out of frustration.
21 And, your Honor, I actually understand frustration. Not getting
22 information when you want to get information. Not getting
23 information in the depth and detail you want to get information.
24 That does evoke frustration.

25 And I wish to Mr. Berghammer and I could have worked

1 that out before a suit was filed and we invoked the scarce
2 resources of this court and our clients are paying a lot of
3 lawyers money because frustration is not a basis to file a
4 complaint. It's not a basis to file a complaint.

5 I want to address quickly, your Honor, if I may,
6 something that was an interesting fact that I don't think
7 Wal-Mart knows, which it has this internal and external site and
8 somehow, there's, you know, products sold on one and it
9 differentiates from another. That's news to me. I think our
10 client will find that to be news. More importantly, and not to
11 be sarcastic about it, it's not in the complaint. Those are not
12 facts that have been alleged or even discernible. They don't get
13 Yeti out of what it unequivocally agreed to for the avoidance of
14 doubt.

15 I struggle, your Honor, to understand how this language
16 can be excerpted from a technical matter. Just from a computer
17 science way of reading URLs. I don't understand the explanation
18 that was given. Walmart.com, as any website that you could go
19 to, has several folders which you can go through will give you a
20 different URL. But the base site is walmart.com, and that is
21 precisely what the parties agreed to would not be in Wal-Mart's
22 control as it relates to commercial activity. And the words that
23 were used is for the avoidance of doubt commercial activity on
24 e-commerce platforms that Wal-Mart does not control, including,
25 but not limited to. Including but not limited to.

1 So even the notion that walmart.com and
2 marketplace.walmart.com might be different, which, respectfully,
3 it's not factually accurate, they were examples. eBay was an
4 example in here. We're just struggling to understand the logic
5 that somehow, there's some exception to this clear exception that
6 both sides agreed to. It is not a Wal-Mart interpretation. It
7 is a Wal-Mart-Yeti agreement.

8 There was one other point, your Honor, that I wanted
9 to --

10 THE COURT: If you could.

11 MS. ELLIOTT: Yes.

12 THE COURT: And this might be where you're headed.

13 MS. ELLIOTT: Okay.

14 THE COURT: Mr. Berghammer pointed out that the
15 language of C.2 refers to this provision. So for the avoidance
16 of doubt.

17 MS. ELLIOTT: Uh-huh.

18 THE COURT: I'm trying to find that language now. It
19 might be in a different paragraph. Oh, I'm sorry, it's that
20 sentence. The end of that sentence, it says --

21 MS. ELLIOTT: Uh-huh.

22 THE COURT: -- none of that activity would constitute a
23 violation of this provision. And their view is that that means
24 that if they're suing under C.1 or C.4, that this language is not
25 at issue either way.

1 MS. ELLIOTT: Yes. So I -- your Honor is one step
2 ahead of everybody. That's where I was going next.

3 I confess, I don't completely follow -- I don't
4 completely follow the argument, but what I was able to discern
5 and note it is that I think Mr. Berghammer said that they can
6 still sue under C.1 and C.4, I think is what I have down.

7 THE COURT: That's what I understood. Yes.

8 MS. ELLIOTT: Okay. So if we look at C.1, it says,
9 except as provided in Sections C.3 and C.7, Wal-Mart agrees that
10 as of the effective date of this agreement, it will not at any
11 time manufacture, have manufactured on the -- on its behalf,
12 market, offer to sell, use, import, purchase, promote, or
13 distribute, whether directly or indirectly, any of the accused
14 products in the United States.

15 So when Yeti says they can still sue under C.1, I'm
16 figuring out -- trying to figure out what it is that they say
17 Wal-Mart has done subject to that provision. Because Wal-Mart,
18 in fact, stopped selling Ozark Trail product pursuant to this
19 agreement. And there's no allegation in the complaint that
20 aligns with C.1 language.

21 Now, to the extent that he's broadly talking about the
22 IP infringement claims in the complaint, those were foreclosed by
23 this settlement agreement and that was dismissed. If he's
24 talking about sales after October 15, 2017, that's where I go
25 back to the omission we discussed earlier. He doesn't point to

1 any Wal-Mart sales after October 15, 2017. What he points to are
2 a couple of generic tumblers. I think their example's 13 through
3 17 in the complaint, your Honor. So a couple of the examples
4 don't identify who's the seller. They don't have the date. They
5 don't have when it was viewed.

6 Now, the couple that later submitted declarations after
7 the fact, not in the complaint, can't be considered on the motion
8 to dismiss, purport to identify, you know, 2018 dates that they
9 were looked at. The problem still goes back to C.2, which is
10 unless you are pointing to a Wal-Mart product, we still have no
11 claim under C.1. There's absolutely nothing cognizable,
12 articulated to, pointed to, identified that will put us in C.1.

13 So what we do have that we can see from the complaint
14 puts us back in C.2, and it puts us back into the Milo &
15 Gabby-Amazon case, and the Multi Time case, and the other ones
16 cited in our briefs.

17 With respect to C.4, this is the takedown of the social
18 media piece.

19 THE COURT: But it also includes --

20 MS. ELLIOTT: Yes.

21 THE COURT: -- anything on walmart.com here explicitly.

22 MS. ELLIOTT: I'm sorry, your Honor, I didn't catch
23 that. One more time.

24 THE COURT: I'm sorry. It says agrees to take down
25 permanently any content that -- internet or social media content

1 of which Wal-Mart has any control.

2 MS. ELLIOTT: Yes.

3 THE COURT: That depicts the accused products, and it
4 says, including any applicable content and hyperlinks on any
5 website of Wal-Mart, including, in this instance, walmart.com.

6 MS. ELLIOTT: Yes.

7 And I think the operative word in that provision, your
8 Honor, is "control" because what the parties define in C.2 is
9 what Wal-Mart does and does not have control over. And so, what
10 C.4 is actually talking about is taking Ozark Trail product down,
11 which Wal-Mart did. So if you were to look on there now, if you
12 were to look on there, you know, whenever they were perusing the
13 website, what you would not find, based on Wal-Mart's having
14 complied with this provision of the agreement, is the Ozark Trail
15 products that it took down. They did have Gen 2, which are the
16 products that Yeti approved of --

17 THE COURT: Was already approved.

18 MS. ELLIOTT: -- on the website. So that that control
19 should be read throughout the whole agreement. I think it defies
20 logic to pull, divorce C.2 and the definition in C.2 from
21 everything else in this agreement. Again, to state the obvious,
22 for the avoidance of doubt was to avoid exactly what we're doing
23 here today, your Honor.

24 We respectfully submit that this is the rare
25 exceptional case. It's a pleasure to be in your courtroom, but

1 we shouldn't be here. This is something that was filed to try to
2 get different terms on that agreement. Wal-Mart understands that
3 Yeti wants to enforce its IP. Yeti wants Wal-Mart to help it
4 enforce its IP. That's not Wal-Mart's responsibility, not under
5 the law and certainly not under the agreement.

6 THE COURT: Thank you.

7 Mr. Berghammer.

8 MR. BERGHAMMER: Thank you, your Honor.

9 So there's some confusion about the agreement and I
10 want to make some things clear, your Honor. So I'm going back to
11 D.4. D.4 states --

12 THE COURT: C.4 or D.4?

13 MR. BERGHAMMER: Thank you, your Honor.

14 THE COURT: C.4. Okay.

15 MR. BERGHAMMER: C.4 states that Wal-Mart agrees to
16 take down and permanently delete internet content over which
17 Wal-Mart has control that depicts any of the accused products,
18 capital A, capital P, including content or hyperlinks on any
19 website of Wal-Mart, including www.walmart.com. So what are
20 accused products?

21 Up there, No. 2 -- before I do that, I'm taking in
22 confidentiality, counsel, is it all right if I disclose the
23 terms? If I disclose the definitions?

24 MS. ELLIOTT: Your Honor, maybe we'll just see where he
25 points to.

1 THE COURT: Sure.

2 MS. ELLIOTT: Thank you.

3 THE COURT: Okay.

4 MS. ELLIOTT: Thank you.

5 MR. BERGHAMMER: So the Section 2 at the top of this
6 document, your Honor, states A-2, which is the agreement -- so
7 it's A-2, accused products means accused beverage holders and
8 accused tumblers as defined herein. A-3 says accused tumblers
9 means the 20-ounce and 30-ounce tumblers depicted in Exhibit A-2.
10 And definition at the bottom of this, page A-1, accused beverage
11 holder means the can beverage holder product depicted in Exhibit
12 A-1.

13 So we're referring to the products in Exhibits A-1,
14 A-2.

15 Here, the agreement points out the accused beverage
16 holder in Exhibit A-1. It says nothing about Ozark Trail. The
17 accused beverage holder does not have any kind of Wal-Mart logo.
18 It's a beverage holder that looks like that. A-2 is examples of
19 the accused tumblers. This is a 20-ounce tumbler and a 30-ounce
20 tumbler. Again, nowhere is there mention of Ozark Trail, as
21 counsel for Wal-Mart mentioned. Nowhere is there any logo.

22 So the only way to read D.4 is, Wal-Mart is agreeing to
23 permanently remove C.4 -- sorry, your Honor, I did it again --
24 any internet content depicting accused products on any website of
25 Wal-Mart, including www.walmart.com. These, your Honor, on

1 counsel table are the products that were advertised on
2 www.walmart.com. These have the exact same profile as the
3 accused products. Wal-Mart today, still, has not removed these
4 products from its website www.walmart.com.

5 Now, I don't think counsel for Wal-Mart is saying this,
6 but I would like to see if she is. Is counsel for Wal-Mart
7 saying that Wal-Mart does not have control of www.walmart.com?
8 That Wal-Mart is not able to take down content on
9 www.walmart.com? If she is saying that, that's exactly the
10 opposite as Wal-Mart was saying in the -- when the GAO report
11 came out saying that Wal-Mart was a counterfeiter. Wal-Mart at
12 that time was saying no, we're not a counterfeiter, we have a lot
13 of control. In fact, we're an invitation-only website. Don't
14 cast us like Alibaba. Don't cast us like eBay. We're very
15 different.

16 If Wal-Mart is -- I'd very much like to hear Wal-Mart
17 say today that they have no control over www.walmart.com. I
18 think it's wrong, but I'd like to hear if that's what they're
19 saying.

20 So that's a violation of D.4, your Honor -- C.4. C.1,
21 Wal-Mart asks what it did that violated C.1. Wal-Mart marketed,
22 offered to sell, promoted, distributed, both directly and
23 indirectly, accused products. There they have. We've got dozens
24 of them. You can't even tell they're counterfeits until you cut
25 them open. You can't tell they're counterfeits, except there's a

1 teeny typo: The C on China isn't capitalized. So they violate
2 both D.4 and D.1. They've also violated Yeti's IP rights.

3 I want to talk about some other things, your Honor. So
4 Wal-Mart has made a lot of comments that Yeti has been moving the
5 ball, has been changing its argument, and that's flatly wrong.
6 This is paragraph 33 of Yeti's complaint and this is a transition
7 paragraph. Prior to paragraph 33, Yeti said, Yeti has all sorts
8 of rights and these rights are awesome.

9 And then, starting in paragraph 33, Yeti says, Yeti and
10 Wal-Mart entered into an agreement, and despite Wal-Mart's clear
11 and express obligations under this agreement with regard to the
12 accused products, Wal-Mart continues to unlawfully advertise,
13 market, promote, offer to sell. And then, what does Yeti do? We
14 went way out of our way and we include image after image. And
15 here, you see it's the Wal-Mart website, image after image of
16 products that are on Wal-Mart's website, walmart.com. And we
17 looked recently, your Honor, they're still there.

18 So when Wal-Mart says it doesn't know what we're
19 talking about, that just falls on deaf ears for us because here's
20 what was from Yeti's complaint. And if Wal-Mart bothered to go
21 to its website, here's an image on Wal-Mart's website from April
22 21 of 2018, and you see this product that's called a Yeti black
23 stainless steel tumbler. Another product from Yeti's complaint
24 and here it is on Wal-Mart's website.

25 So from Wal-Mart -- I'll just do another one. Here's

1 another image from Yeti's complaint. I've got the pages screwed
2 up, your Honor. Here's another image from Yeti's complaint. And
3 here's the image on Yeti's -- on Wal-Mart's website on April 21.

4 So Wal-Mart's arguments that Yeti has been changing its
5 arguments are just flat wrong. Yeti, all along, has said to
6 Wal-Mart, everything was going fine. We signed this agreement
7 and you breached the agreement, and it's based on your breach of
8 the agreement that we're suing you. And we're not only suing you
9 for breach of the agreement, we're suing you for intellectual
10 property infringements; and yet, you sell counterfeit products,
11 you sell infringing products, all those claims remain in this
12 case.

13 I also, your Honor, briefly want to talk about harm and
14 why a stay really harms Yeti. Two reasons. One, Wal-Mart
15 continues to sell and these products are grossly inferior. The
16 comments on Wal-Mart's website regarding these products, lid
17 cracked, bottom cracked, doesn't keep ice, dripping, just over
18 and over again about how these are inferior products. And the
19 people on Wal-Mart's websites that buy them think they're from
20 Yeti. So this bad will is being attributed to Yeti. On top of
21 that, evidence is being lost.

22 If we stay discovery, especially on the internet, we're
23 losing evidence, we might not be able to find people that did
24 postings, memories fade, e-mail addresses change. So this is a
25 classic case where we can't stay discovery.

1 And in addition, your Honor, while Wal-Mart says Yeti
2 is changing its position, which Yeti is not, it's Wal-Mart that's
3 changed its position in its motion to dismiss. So our whole
4 premise today is that the motion to stay is based on Wal-Mart's
5 motion to dismiss. It claims res judicata. All right. That's
6 out of the case. It claims that Yeti has not alleged sufficient
7 harm. Well, we've got like 15 bullets of harm that we've alleged
8 in the case. And then, they say, well, Yeti hasn't alleged
9 specifically what the violations are.

10 Paragraphs 33 through 48 do that, including numerous
11 illustrations. So Wal-Mart has now changed its argument to say,
12 oh, well, actually, we're making this breach of contract
13 argument, which it didn't make with any significance in the
14 motion to dismiss. It may have touched on it in passing, but it
15 barely made the argument. And regarding that argument, which
16 you're hearing all orally, your Honor, it doesn't address C.1 and
17 C.4. It doesn't address Yeti's intellectual property rights
18 outside breach of contract.

19 So I know I'm getting a little adamant, your Honor.
20 Thank you.

21 THE COURT: All right.

22 Ms. Elliot, it's your motion, so you get to have the
23 last word.

24 MS. ELLIOTT: Thank you, your Honor.

25 Your Honor always worry about casting aspersions and

1 speculating, but we heard Mr. Berghammer acknowledge some things.

2 He wants Wal-Mart to police IP for Yeti. That's pretty
3 explicit. It was sprinkling in through their motion papers and
4 discovery, but it's pretty much on the table now. It's not just
5 Wal-Mart speculating. Yeti wants Wal-Mart to police the internet
6 for their alleged IP rights, which, again, is not Wal-Mart's
7 responsibility under the law and under the express terms of the
8 agreement.

9 Everybody that Mr. Berghammer just pointed to, what he
10 was saying was in the complaint and was examples in the papers
11 are all third-party products. Wal-Mart's not manufacturing,
12 Wal-Mart's not selling them. Wal-Mart is hosting the sale on its
13 e-commerce platform, just like eBay and Amazon does. And I don't
14 want to harp on that, your Honor, because I -- I suspect that our
15 positions are clear whether -- who's right on it remains to be
16 seen, but I think we want to be clear on that.

17 I think it's also pretty clear based on argument --
18 there was a footnote in a brief -- but it came out clear today,
19 Yeti is looking for an avenue to go back to the terms of this
20 agreement. He mentioned rescission as damages. I mean, your
21 Honor, this is pretty now blatant attempts to go back and
22 renegotiate the terms of this agreement. Impermissible. You
23 can't use device of discovery with no actionable, cognizable
24 claims to go then find some claims so that you get an agreement
25 with terms that are better than the first. That's just, I think,

1 inappropriate and it's impermissible under the law.

2 It's interesting that Yeti has spent a lot of time in
3 its recent papers and discovery and comments to your Honor and
4 Judge Pitman about counterfeiting. Yeti can't possibly say
5 counterfeiting started after March 2017. This -- according to
6 this documents they cite, which are outside of the complaint and
7 not appropriate for this determination, but nonetheless, they
8 talk about counterfeiting all over the marketplace and that it's
9 been going on for quite some long time.

10 And why am I mentioning the timing of that is because a
11 good portion of our motion to dismiss is about the fact that
12 these were complaints that either were raised or could have been
13 raised in the first suit. And under the black-letter case law of
14 res judicata, they're foreclosed; and they're also foreclosed
15 under the settlement agreement under Section F.1, your Honor.

16 And if I just may briefly put that on the screen. It's
17 a covenant not to sue. Oh, I'm sorry.

18 THE COURT: Any objection to that?

19 MS. ELLIOTT: I apologize. Thank you.

20 THE COURT: Any objection to us looking at that F.1
21 provision?

22 MR. BERGHAMMER: No, your Honor.

23 THE COURT: Okay.

24 MS. ELLIOTT: In F.1, your Honor, for the record, it's
25 Yeti covenants not to sue Wal-Mart and Wal-Mart's

1 representatives, officers, directors, employees, successors,
2 agents, customers, assigns, and other transferees, but not
3 including entities that provided the accused tumblers to
4 Wal-Mart, from any and all demands, claims and causes of action
5 Yeti raised or could have raised in the lawsuit related to the
6 accused products sold by Wal-Mart. Yeti's covenant not to sue
7 does not extend to the Sam's publication.

8 So, your Honor, here's another example like C.2 of the
9 parties effectively repeating what is the law. We are now
10 hearing all kinds of ways to read and torture the language of
11 this agreement to somehow wrestle some claim together that would
12 allow discovery to proceed, and, your Honor, we respectfully
13 submit that's not the way this process should go. That's not the
14 way litigation should be used. And that's not how the court
15 resources and party resources should be used.

16 We regret that the information that was provided in
17 February did not get to Yeti in November. Wal-Mart regrets that.
18 There's reasons for that, but there's also the reasons for that
19 are reflected in the language of this agreement. Their language
20 that was inserted, reasonably track. There's language talking
21 about reasonable efforts. That language was entered into the
22 agreement by the parties because of the issues around designs
23 being so similar, the Gen 1 and Gen 2 being similar and the
24 difficulties in the marketplace of distinguishing them.

25 I don't want to get in too much detail about it. It's

1 not -- we have to all work off of the complaint and this
2 agreement, and we think those are the things we should be focused
3 on for purposes of motion to dismiss and the motion for a
4 protective order. And so, we do focus on that. But I just want
5 the acknowledge we do regret not getting that information sooner,
6 but it's not a breach of this agreement. Even if it was a breach
7 of the agreement, Yeti doesn't disclose any way it was harmed by
8 that three-month differential time.

9 Your Honor, we don't think there is any claim to pursue
10 here. And we don't think that Yeti should get wide-ranging
11 discovery on claims that are clearly foreclosed under the law and
12 under their agreement. And should there be any remaining aspect
13 of discovery for some breach of this notice provision, it
14 certainly should cabin any discovery that should be ordered to
15 proceed, your Honor.

16 We thank you for your time and for listening.

17 THE COURT: Thank you.

18 Probably won't surprise you, I want to digest all of
19 this and look at this more carefully, and then, we will get
20 something out relatively soon on the issue of the protective
21 order and whether discovery can go forward.

22 Thank you for the elucidation; it helped a lot. But I
23 always think that I get something out of these hearings when
24 there's something like this that helps me clarify things. So
25 appreciate it. We'll stand in recess.

1 MR. BERGHAMMER: Thank you, your Honor.

2 MS. ELLIOTT: Thank you, your Honor.

3 (Proceedings conclude at 3:35 p.m.)

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REPORTER'S CERTIFICATE

I, LILY I. REZNIK, DO HEREBY CERTIFY THAT THE FOREGOING WAS
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STATES.

/s/Lily I. ReznikMay 14, 2018

LILY I. REZNIK

DATE